

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GERALD HENDERSON

Claimant

VS.

SHAWNEE COUNTY

Respondent

Self-Insured

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Docket No. 227,046

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Brad E. Avery on May 17, 1999. The Appeals Board heard oral argument October 13, 1999.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared on behalf of claimant. Larry G. Karns of Topeka, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The two issues on appeal are: (1) what was claimant's average weekly wage at the time of the accident; and (2) what is the nature and extent of claimant's disability?

The Administrative Law Judge found claimant was a full-time employee with an average weekly wage of \$366.40. On appeal, respondent contends claimant was a part-time employee and the wage should be calculated on that basis.

The Administrative Law Judge awarded benefits for a 26 percent work disability. On appeal, respondent contends claimant should be limited to a disability based on functional impairment only.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. The Board finds claimant was a part-time employee with an average weekly wage of \$274.80. Because the Board has found a lower wage than found by the ALJ, the wage loss and resulting work disability are also lower. The Board finds claimant is entitled to benefits for a 15.5 percent work disability.

Findings of Fact

1. Claimant injured his back on July 25, 1997. The injury arose out of and in the course of claimant's employment for respondent.
2. Claimant began working for respondent as a temporary employee on July 23, 1997. As a temporary employee, he was not guaranteed 40 hours per week and temporary summer help generally averaged approximately 30 hours per week. Claimant was injured on July 25, 1997. He had worked 6.75 hours on July 23, 6.25 hours on July 24, and 5.5 hours on July 25, the date of his injury.
3. Respondent had temporary employees, permanent part-time employees, and permanent full-time employees. The full-time employees were guaranteed 40 hours of work per week and were paid for 40 hours if the work was not available. Temporary employees and permanent part-time employees were not guaranteed 40 hours per week and were paid only for the number of hours actually worked. A temporary employee was expected to work 40 hours or more if the work was available but generally worked approximately 30 hours per week.
4. After the injury, respondent terminated claimant. Claimant then sought and obtained other employment, first with Frito Lay and ultimately for Wal-Mart. Claimant testified he could not continue with the work at Frito Lay because he had to stand for eight hours per day. The job at Frito Lay paid \$9.30 per hour and the job at Wal-mart paid only \$6 per hour. The work at Wal-Mart was also part-time. Claimant worked 20-28 hours per week.
5. While working for respondent, claimant earned \$9.16 per hour. He worked a total of 32 hours.
6. Dr. Peter V. Bieri examined the claimant at the request of the ALJ. He rated the impairment as 5 percent of the whole body. He also found claimant capable of doing medium/heavy level of work with restrictions of limiting lifting to 70 pounds occasionally, 35 pounds frequently, and 15 pounds constantly. He imposed no restrictions for standing.

Dr. Bieri reviewed a list of the tasks claimant performed in the 15 years before the injury and concluded claimant cannot now do 2 of 11 tasks, or 18 percent.
7. Mr. Richard W. Santner, vocational rehabilitation counselor, testified regarding claimant's efforts to find employment. Claimant made no effort to find employment for the

first two months after he was released. In the approximately one year before the regular hearing, claimant applied at only 6 employers. Claimant worked briefly at Frito Lay and also apparently briefly on a farm in Texas. Claimant testified the farm work did not work out because he was not able to lift the equipment.

Conclusions of Law

1. Full-time employee is defined in K.S.A. 44-511(a)(5) as follows:

The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

2. Part-time employee is defined in K.S.A. 44-511(a)(4) as follows:

The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

3. The Board finds claimant was a part-time employee in his work for respondent. He was expected to work on a regular basis less than 40 hours per week and there was no customary number of hours constituting an ordinary day. Claimant's counsel points out claimant was docked 8 hours for days missed and argues this confirms that claimant was a full-time employee. But to say claimant was docked only refers to the termination policy. Employees who did not show for work a specific number of days were terminated. If claimant did not appear for work at all in a given day, he was treated for purposes of the termination policy as missing a full day. This was recorded as 8 hours. This fact does not, in our view, make his status full-time.

4. K.S.A. 44-551(b)(4) provides that the pay for part-time employees is to be calculated pursuant to subsection (b)(5) and that subsection makes specific provision for employees who have not been employed for a full week at the time of the injury. Subsection (b)(5) states in pertinent part:

If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage

shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer

In this case claimant had been employed for less than one full week at the time of the accident. The Board finds the best evidence of the average weekly wage is the testimony that part-time employees generally work approximately 30 hours per week. At claimant's hourly rate of \$9.16, claimant's average weekly wage would, for a 30-hour week, be \$274.80, and the Board finds this to be claimant's average weekly wage in this case.

Respondent has argued for a wage of \$293.12 based on five days of work for respondent. But two of those days, as shown on the wage record, were after the accident and would not be used to calculate a preinjury wage.

5. K.S.A. 1997 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

6. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

7. The Board finds claimant did not make a good faith effort to find employment. On this issue the Board agrees with the findings of the ALJ. The Board accepts as true claimant's testimony that he was not able to continue with the work at Frito Lay or the farm work. The Board finds claimant is capable of earning \$6 per hour on a full-time basis or \$240 per week. Claimant's wage loss, \$240 compared to the average weekly wage of \$274.80, is 13 percent.

8. The Board finds claimant has a task loss of 18 percent. This finding is based on the opinion of Dr. Bieri, the only physician to give a task loss.

9. The Board finds claimant has a work disability of 15.5 percent. K.S.A. 1997 Supp. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery on May 17, 1999, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gerald Henderson, and against the respondent, Shawnee County, a qualified self-insured, for an accidental injury which occurred July 25, 1997, and based upon an average weekly wage of \$274.80, for 64.33 weeks at the rate of \$183.21 per week or \$11,785.90, for a 15.5% permanent partial disability, all of which is currently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Larry G. Karns, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director